

made by the High Court which is more familiar with the appropriate forms of procedure in Malaysia than they are themselves and they will therefore advise the Yang Dipertuan Agung that the Order made by the lower court on August 12, 1972 and the amendment by the Federal Court made on October 6, 1973 be set aside (except as to costs in both courts) and that the case be remitted to the High Court to make such Order as to that court seems appropriate to give effect to the opinion expressed by this Board. There should be liberty to both parties if so advised to apply to the High Court with regard to the form of Order. The appellant should bear the costs of the proceedings before this Board so far as they relate to the appeal and the respondent should bear the costs so far as they relate to the cross-appeal.

Their Lordships will advise the Yang Dipertuan Agung accordingly.

Order accordingly.

Solicitors: *Wilson Freeman; Lovell White & King.*

A MALAYSIAN REPORTS

RE ESTATE OF CHOONG LYE HIN, DECD.; CHOONG GIM GUAN v. CHOONG GIM SEONG

[F.C. (Suffian L.P., Lee Hun Hoe, C.J. (Borneo) and Wan Suleiman F.J.) October 16, 1976]

[Penang — Federal Court Civil Appeal No. 3 of 1975]

B

Administration of estates — Inter vivos gifts — Payment of estate duty due on inter vivos gifts by trustees — Claim by beneficiary for share in estate — Set-off and counterclaim by trustees — Payment by mistake — Whether recoverable — Limitation — Estate Duty Enactment, 1941, s. 26(1), 33(1) — Trustees Ordinance, s. 60.

C

The appellant claimed (a) the balance of his share in the estate of his deceased father and (b) the balance of the sum kept in a trust account by his father in an account under the name of "Gim Kee". The respondents the trustees claimed a right to set-off and counterclaim based on estate duty paid out of the estate in respect of *inter vivos* gifts to the appellant and by the third defendant in respect of the share of the appellant in moneys in the Gim Kee account. It was argued on behalf of the appellant that the estate duty was paid without his knowledge, consent or request and that it was paid under a mistake of law and therefore not recoverable. It was also contended that the defendant's right to recover the estate duty was barred by limitation. The learned trial judge gave judgment in favour of the respondent on the set-off and counterclaim. The appellant appealed.

E

Held: (1) in this case the finding of the learned trial judge that the appellant knew and acquiesced in the payment of the estate duty must be accepted and therefore on the evidence in this case, even though the payment of estate duty was a mistake of law, the circumstances of the case render it inequitable that the appellant should be allowed to retain the benefit of the payment;

(2) the claim of the respondents in this case was not statute-barred;

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(3) in view of the large number of proceedings relating to the estate and in order to make it clear that the respondent was not liable to make good to the appellant any benefit already received or enjoyed by the appellant, the respondents was entitled to an order granting relief under section 60 of the Trustees Ordinance.

Cases referred to:-

G

- (1) *Hill v. Kirshenstein* [1920] 3 K.B. 556.
- (2) *In re Hatch* [1919] 1 Ch. 351.
- (3) *Re Diplock's Estate, Ministry of Health v. Simpson & Ors.* [1951] A.C. 251.
- (4) *In re Diplock, Diplock v. Wintle* [1948] Ch. 465.
- (5) *Rogers v. Ingham* (1876) 3 Ch.D. 351.
- (6) *Kiriri Cotton Co. Ltd. v. Dewani* [1960] 1 All E.R. 177, P.C.
- (7) *Nasri v. Mesh* [1971] 1 M.L.J. 32, F.C.
- (8) *Strong v. Bird* (1874) L.R. 18 Eq. 315.
- (9) *In re Forster* [1897] 1 Ch. 484.
- (10) *In re Beddington* [1900] 1 Ch. 771.
- (11) *In re Crocker* [1916] 1 Ch. 25, 56.
- (12) *In re Hudson* [1911] 1 Ch. 206.
- (13) *Sinclair v. Brougham* [1914] A.C. 398 at p. 456.
- (14) *Re Cleadon's Trust Ltd.* [1938] Ch. 286 at p. 321.
- (15) *Warren v. Warren* 72 L.J. 628.

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I

- (16) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 at p. 64.
- (17) *Re Woodridge* [1920] W.N. 78.
- (18) *Dibbs v. Goren* 50 E.R. 904.
- (19) *In re Ainsworth* [1915] 2 Ch. 96 at p. 104.
- (20) *Official Assignee v. Tan Cheng Guan* (1904) 2 M.C. 1.
- (21) *Richard v. Delbridge* (1874) 18 Eq. 1.
- (22) *Warriner v. Roger* L.R. 16 Eq. 340.

- (23) *In re Fry* [1946] Ch. 312.
 (24) *In re Rose* [1949] Ch. 78.
 (25) *In re Stewart* [1908] 2 Ch. 251.
 (26) *In re James* [1935] Ch. 449.
 (27) *In re Innes* [1910] 1 Ch. 188.
 (28) *In re Robinson's Settlement, Grant v. Hobbs* [1912] 1 Ch. 717, 727 and 728.

HIGH COURT.

Lim Ewe Hock for the plaintiff.

Chin Yew Meng for the defendants.

The following judgment was delivered in the High Court on December 28, 1974:

Chang Min Tat J.: This case consolidates two civil suits. In Civil Suit No. 98 of 1966, the plaintiff sued the three defendants personally and as executors and trustees of the estate of Choong Lye Hin deceased for payment of his share in the residuary estate of the testator and for ancillary reliefs. The amount was specified at \$66,000 being the 2/13th share due to the plaintiff of the sum so far distributed to the other beneficiaries. The three defendants filed one defence, but when the case came up for hearing, the 1st and 2nd defendants had died and the action was at the choice of the plaintiff not continued against their estates. This must be a matter for comment in the circumstances of the case since the action was against them personally as well as in their representative capacity. The defence became therefore that of the 3rd defendant. He pleaded that he can set-off a sum of \$108,805.62, being the aggregate of the estate duty payable on the gifts *inter vivos* to the plaintiff which were caught by estate duty, and accumulated interests thereon. On this set-off, the defendant counterclaimed for \$42,805.62. This suit is hereafter referred to as the earlier suit.

In Civil Suit No. 57 of 1968, (hereinafter referred to as the later suit), the plaintiff sued the defendants again personally and as trustees for his share in an account known as the Gim Kee, and for damages. He charged the defendants with failure to declare this account among the assets of the testator, thereby incurring unnecessarily penalty in respect of the estate duty that was paid late. There is also a counterclaim.

Part of the difficulty in this case stems from the compilation of the bundles of pleadings for the use of the judge. This procedural provision has been designed for the convenience of the judge, but it must be seen that it does not make for convenience, if in the several bundles of pleadings, every single amendment of the pleadings is shown. It would have been a kindness which I would have greatly appreciated if a simple bundle containing the pleadings as finally, settled had been submitted.

The plaintiff and the defendants were the four sons of the late Mr. Choong Lye Hin who died on April 13, 1948. In his will he bequeathed a two-thirteenth share in his residuary estate to the plaintiff, apart from a monthly allowance of a \$100 to be increased to \$200 a month on his marriage as well as a sum of \$5,000 on his marriage. The sum of \$5,000 was for marriage expenses as well as for purchase of jewellery.

A It should be explained at this stage that the four persons in this action are the sons of the testator by his first wife who had predeceased him as far back as 1933. The testator had two other wives who survived him and several children by them. He also had two daughters by his first wife. The defendants were his three eldest children and they were appointed by him to be trustees and executors of his estate. At the time when he executed the will in 1945, the plaintiff who was born in 1924 was then aged 21 years.

B The testator appeared to have drawn a distinction between the sons by his first wife and those by his other wives or as they are commonly known, secondary wives. He classified the sons by his first wife, as is the custom among the Chinese to denote members of a certain generation, by giving them a middle name "Gim". His sons by his secondary wives who belonged to the same generation and could be called "Gim" were however known as "Eng". This is of some significance.

C Probate in his estate was applied for and granted on September 2, 1948. The executors were at all relevant times acting by solicitors. The declared estate was valued at more than half a million dollars, but at that time when the estate duty affidavit was filled, no reference was made to include the gifts *inter vivos* made by the testator during the last three years of his life, which was then, the period within which the gifts were caught by estate duty. Nor was reference made to a sum of \$101,829.47 known as the "Gim Kee" account in the Hock Hin Bros. Ltd., which has been created by the testator in his life time.

The gifts *inter vivos* consist of the following:

To Choong Gim Eng

500 shares in Hock Hin Bros. Ltd., and 300 shares in Choong Cheng Kean Estate, premises No. 38, Perak Road, Penang.

To Choong Gim Cheow

250 shares in Hock Hin Bros. Ltd., and 300 shares in Choong Cheng Kean Estate, premises No. 36, Perak Road, Penang.

To Choong Gim Seong

500 shares in Hock Hin Bros. Ltd., and 1,110 shares in Choong Cheng Kean Estate, premises No. 33, Peel Avenue, Penang.

To Choong Gim Guan

500 shares in Hock Hin Bros. Ltd., and 1,100 shares in Choong Cheng Kean Estate.

The respective values are \$96,674.50, \$95,674.50, \$237,349 and \$211,349. The total value of these gifts *inter vivos* was \$641,047. The estate duty on these gifts *inter vivos* was \$173,082.69 and the interest due was \$32,383. This duty and interest were paid by November 21, 1951.

D Now the Gim Kee account, the subject-matter of the later suit stood at \$101,829.47 at its creation. The evidence of the third defendant was to the effect that the word "Gim" refers to the four sons by the first wife bearing the middle name "Gim" and the "Kee" was an account, so that Gim Kee meant the Gim account. This was created by the testator trans-

ferring all his money in Hock Hin Bros. Ltd. in 1947, into this account. In the 1948 accounts of Hock Hin Bros. Ltd. this account stood at \$34,647.50 and the third defendant explained that the diminution was occasioned by the four of them drawing out from it and distributing among themselves. By 1949 the whole account was drawn out.

Estate duty and interest on this Gim Kee account came to \$123,350.65.

Since all the gifts to the beneficiaries were not affirmed in the will as being gifts free of duty, the donees must bear the share of the estate duty payable on the gifts to them. But it is contended by the plaintiff that since the estate duty on these gifts were paid by the trustees without his prior request as donee, such payment being made under a mistake of law could not be recovered from him.

A red red-herring was drawn across this case. It called for a great deal of evidence. But the time was not actually lost. It concerned the jewellery belonging to the mother of the parties to these actions. She died intestate as far back as 1932 or 1933 when the plaintiff was only 9 years old. The plaintiff believed and he apparently was fed on this belief that he was entitled to at least part of the jewellery by way of gifts from the mother to him. He had an idea that this entitlement was given to the 3rd defendant to keep and that the third defendant had sold and converted the jewellery to his own use. He frankly admitted that this was the cause of the souring of the relations between him and the 3rd defendant which up to that time had been very good. He had in fact, as can still be seen from his correspondence, regarded the 3rd defendant with greater love and affection than he had for his father. He depended more on his brother than on his father. The fact however was clear on the evidence that the mother died intestate and that at law, on intestacy, all her estate devolved on her husband and there was equally no doubt of the evidence that the father had in fact kept the jewellery and sold some of them. What he did with the proceeds of the sale or with the jewellery that was not sold was of course his right as the person to whom the property devolved at death. In my view, there was no justification for the plaintiff's suspicion that the 3rd defendant had cheated him of the jewellery which he was in any event unable to identify but the fact remains that from the moment he had that suspicion, his love for his brother turned to intense hatred and the passage of time had not, in any way, diminished that hatred. It was apparent in his bearing and the way in which he gave evidence it hid the charm which he obviously had and which occasionally the court had a glimpse of. One must wonder whether this intense feeling had not only coloured his outlook but had also distorted his view of things.

The evidence was that on his return from China in 1949 the plaintiff worked in the office of Hock Hin Bros. Ltd. which was a partnership formed by his father and his uncle. The 3rd defendant was also in that firm and the affairs of the Estate of Choong Lye Hin were managed in that firm. The plaintiff was working there until some time in 1953. It is also common ground between the plaintiff and the 3rd defendant

A that the relationship between them only became strained towards the end of 1952. This meant that when the estate duty was paid on the estate they were still on good terms. The plaintiff however maintained that while he was working in Hock Hin Bros. Ltd. he had no access to the books of the father's estate or the Gim Kee account. The defendant and his witnesses said that he had such access. The defendant also averred that he kept him informed about the administration of the estate. There was no reason for non-disclosure. In the circumstances of the case I much prefer the evidence of the defendant to that of the plaintiff and I find as a fact that the plaintiff had knowledge of how the estate was administered and in particular about the payment of estate duty on the gifts *inter vivos* from the estate and that if he had not requested the defendant to pay the estate duty on the gifts to him he knew of and acquiesced in such payment.

It is reasonably clear that under the provisions of section 26 of the Estate Duty Enactment the person accountable and under liability to pay the estate duty on gifts *inter vivos* is the donee if the gift has passed to his possession. The executor may however pay this duty if the property is under his control or in the case of property not under his control, if the person who is the accountable person requests him to make such payment.

E The payment of the estate duty by the defendant on the gifts made *inter vivos* to the plaintiff was, in the absence of any request by the plaintiff, said to be a mistake of law and it was strenuously argued by counsel for the plaintiff that payment made under such a mistake was not recoverable.

F In support of this contention at law, Mr. Lim for the plaintiff relied on a passage from Chitty on Contract, 20th Edn. at p. 104. He also relied substantially on three cases. The first was *Hill v. Kirshenstein*,⁽¹⁾ There the tenant paid the landlord's property tax, but omitted to deduct it from the next payment of rent, which he was entitled to do. When he sought to do so from subsequent rents, it was held he had no right. The next was *In re Hatch*,⁽²⁾ where it was held that past over-payments in respect of the wife's income tax having been made under a mistake of law were not recoverable as a debt from the wife and could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband. The third was *Re Diplock's Estate, Ministry of Health v. Simpson & Ors.*⁽³⁾ This was a case where acting under a mistake of law the personal representatives of a testator whose residuary disposition was invalid, distributed his residuary estate on the footing that it was valid, among charitable institutions, which received the payment in good faith. It was held in the House of Lords, affirming the decision of the Court of Appeal, sub. nom. *In re Diplock, Diplock v. Wintle*⁽⁴⁾ that, subject to the qualification that they must have first exhausted their remedy against the personal representatives, the next of kin had a direct claim in equity against those to whom the residuary estate had been wrongly distributed.

It was said that *In re Hatch*⁽²⁾ was approved by the House of Lords in *Re Diplock's Estate*.⁽³⁾ With the greatest of respect, the following extract from the judgment of the Court of Appeal at p. 500 would appear to show at the very least that the authority of *In re Hatch*⁽²⁾ is doubtful. It came after discussing the judgment of Sargant J. It reads:—

"It is unnecessary in the present case to express any view on the correctness of the decision in *In re Hatch*. It is sufficient to observe that once again, no reference was made to any of the *Noel v. Robinson*, 1 Vern. 20, authorities and that had such reference been made, it is at least possible that some of Sargant J.'s observations would have been subject to qualification. In our view the case cannot in the circumstances be regarded as any authority against the extension of the principle of equity jurisdiction for which the appellants contend."

In the House of Lords in *Ministry of Health v. Simpson & Ors.*,⁽³⁾ Lord Simonds in his speech said at p. 276:

"Two other cases I will do no more than mention, *Hilliard v. Fulford*, 4 Ch.D. 369 and *In re Hatch*, for I am fully satisfied with the observations of the Court of Appeal upon them."

I accept, of course, that the authority of *Ministry of Health v. Simpson & Ors.*,⁽³⁾ *supra*, is unchallengeable. It was relied on undoubtedly in the decision in O.S. 159/62 brought by some of the residuary beneficiaries against the defendants in these 2 actions, wherein the applicants successfully surcharged the defendants for the payments made without justification which deprived them of their due share in the estate. It was as in *Ministry of Health v. Simpson & Ors.*⁽³⁾ very much a case "where without his acquiescence or even his knowledge an executor wrongs a creditor or beneficiary by paying to another money which should be paid to him" *per* Lord Simonds at p. 272.

The learned Law Lord was in fact quoting from James L.J. in *Rogers v. Ingham*.⁽⁵⁾ This case was a case where a trustee by the direction or with the authority of his *cestui-que-trust* paid money to a third person. It was distinguishable and in fact it was distinguished in *Ministry of Health v. Simpson & Ors.*⁽³⁾ but for the purpose of this case, there is this passage from the judgment of Mellish L.J. at p. 357 which is in my view both relevant and applicable:

"There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with the Courts of Law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction, which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice Turner, '*This Court has power (as I feel no doubt it has) to relieve against mistakes of law as well as against mistakes in fact; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.*'"

In *Kiriri Cotton Co. Ltd. v. Dewani*,⁽⁶⁾ Lord Denning endorsed this in these words:

"The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on

A the matter. *Ignorantia juris neminem excusat*. Now is it correct to say that money paid under a mistake of law, by itself, and without more, cannot be recovered back. James L.J. pointed out in *Rogers v. Ingham*: if there is something more in addition to a mistake of law — if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake — then it may be recovered back."

B It is conceded, of course, that the Privy Council was dealing with a claim for the return of a sum paid illegally as consideration for a tenancy but with respect, I take the view that where it is inequitable for the party who received the money or the benefit of any payment to retain it, he should be made to repay or account for the benefit. The various charities who received the donations in *Ministry of Health v. Simpson & Ors.*⁽³⁾ in good faith were nevertheless ordered to refund to the beneficiaries. For myself, I do not, with respect, see any difference between these charities and the plaintiff in this case and between the next of kin and the defendant in his personal capacity. This is, in my view, eminently so, in the finding I have made which appears to me to be supportable on the evidence that the plaintiff knew and acquiesced in the payment of the estate duty on the gifts received by him. Even if it is correct that payment of estate duty in respect of gifts *inter vivos* given to someone who is also a residuary beneficiary and who therefore has properties which could be attached in payment of any lawful claim against him is a mistake of law, I am of the opinion that the circumstances of this case render it inequitable that the plaintiff should be allowed to retain the benefit of the payment on the gifts *inter vivos*.

F This view relieves me of any necessity to consider laches on the part of the plaintiff which has been pleaded and the defendant's reliance on section 60 of the Trustee's Ordinance, except to say that the case for the defendant on those grounds appears to be a very strong one.

G Limitation is pleaded, in a way, by way of defence to the counterclaim but if my reading of *Nasri v. Mesah*⁽⁷⁾ is correct, time does not run against the defendant until the plaintiff had resisted his claim.

H As for the later case in respect of the Gim Kee account, the gifts to the plaintiff, as his own counsel contended, was clearly an imperfect gift but in respect of the gift to the three defendants, it was perfected by the rule in *Strong v. Bird*⁽⁸⁾ by the donor naming them his trustees and executors. The gift to the plaintiff falls into residue and the plaintiff is entitled as a residuary legatee to a 2/13th share in it. The defendant had personally paid the estate duty, interest and penalty on this asset. For the same reasons and especially as, in view of the plaintiff's own admission that he knew of the will and of his legacy to a small monthly subsistence allowance and a sum of \$5,000 for purchase of jewellery on his marriage and that he was at that time advised by the defendant that their mother had left him no jewellery and he had accepted it, I find myself compelled to the conclusion that to the knowledge of the plaintiff the sums of money sent him by the defendant when he was in Hong Kong came from this account, of whose existence he therefore knew. I also conclude that the

payment of estate duty on the quarter of the account which falls into residue was also with his knowledge and acquiescence. I find confirmation in the admission of the plaintiff that he had at no time any money to pay the estate duty.

There is a counterclaim by the defendant in the later case for refund of the estate duty, interest and penalty on the quarter share given to the defendant. In this form the counterclaim could clearly not be maintained.

The plaintiff is on the will entitled to a 2/13th part in a quarter of this Gim Kee account. The account stood at \$101,829.47. Proper estate duty amounted to \$45,692.77 as in the statement of claim. I agree that the plaintiff should not be made to bear the penalty and added interest charged, without there being any evidence of his complicity in failing to declare this asset. The balance is \$56,136.70. The quarter that falls into residue amounts to \$14,034.18. Of this sum, the plaintiff is entitled to a 2/13th share. As I work it out it comes to \$2,159.10. However in view of the admissions by the plaintiff of his receipt of various sums grossly in excess of the sum of \$2,159.10 before the due date of the distribution of the residuary estate, there can be no substance in the claim in the later case or in the claim for damages. It is dismissed with costs. The same admissions found the counterclaim which is allowed in the sum of the advances to the plaintiff less the sum of \$2,159.10 and costs.

The claim in the earlier action No. 98 of 1966 is dismissed with costs. The counterclaim is allowed with costs.

FEDERAL COURT.

Lim Ewe Hock for the appellant.

Chin Yew Meng for the respondent.

Lee Hum Hoe C.J. (Borneo) (read by Wan Suleiman F.J.) (delivering the judgment of the Court): This appeal is against the decision of the learned judge in a consolidated action in respect of two civil suits. When the case came up for hearing in the High Court the first two defendants had passed away leaving the 3rd defendant to carry on with the conduct of the defence. The appeal lasted some three days.

Choong Lye Hin, the testator, died on April 13, 1948. His first wife, Lee Chye Pin, predeceased him as early as 1933. By her, he had four sons (the parties to the action) and two daughters but the eldest, Siew Thay, died during the Japanese Occupation. By a will dated April 17, 1945, together with a codicil thereto, the testator appointed his three elder children, the defendants, to be the executors and trustees of his estate. The will makes financial provisions for his (1) four sons and daughter, Siew Kim, by his first wife; (2) three secondary wives, Teh Paik Lean, Cheong Khoon Moy, Yeoh Lean Sim and their children; (3) two adopted daughters; and (4) mistress, Tay Say Im. Certain monthly allowances are made to various members of his family. The main beneficiaries to the residuary estate are his nine children. The parties each get 2/13th share while the other beneficiaries

A each 1/13th share. However, the residuary estate is not to be distributed until 12 years after testator's death. Apart from his 2/13th share in the residuary estate the plaintiff also enjoyed a monthly allowance of \$100 which was increased to \$200 on his marriage and a sum of \$5,000 on his marriage for marriage expenses and purchase of jewelleryes.

B On September 2, 1948 the High Court at Penang, granted probate to the three defendants as executors and trustees who at all times retained solicitors to act for them. The initial estate duty affidavit declared the assets as approximately \$566,000. No mention was made of certain gifts, *inter-vivos* made by the testator during the last three years of his life. Such gifts would attract estate duty. Neither was reference made to money in an account in Hock Hin Bros. Ltd. known as "Gim Kee" account which was created by the testator during his life time, apparently for the benefit of his four sons by his first wife.

The particulars of the *inter vivos* gifts are set out below:—

Donee	Hock Hin Bros Ltd	Choong Cheng Kean Estate
Gim Eng	500 shares	300 shares
Gim Cheow	250 shares	300 shares
Gim Seong	500 shares	1110 shares
Gim Guan	500 shares	1100 shares

Premises	Value
No. 38, Perak Road, Penang	\$96,674.50
No. 36, Perak Road, Penang	95,674.50
No. 33, Peel Avenue, Penang	237,349.00
	211,349.00
	<u>\$641,047.00</u>

Since these *inter-vivos* gifts were made within three years of the death of the donor estate duty was payable thereon under section 5(iii) of the Estate Duty Enactment, 1941. However, these gifts were not declared at the time the estate duty affidavit was filed. Consequently, in 1951 the Collector of Estate Duty re-valued the assets of the estate at \$1,449,158.77 and assessed estate duty on the whole estate at \$391,272.87 with interest of \$73,307.87. The estate duty attributable to the *inter vivos* gifts was \$173,082.69 with interest of \$32,383. The total estate duty computed on the whole estate was paid by the executors in full by November 21, 1951.

The amount of estate duty and interest payable by each donee of the *inter-vivos* gifts are tabulated as follows:—

Donee	Value of Gift	Estate Duty	Interest	Total
Gim Eng	\$ 96,674.50	26,102.00	4,883.00	30,985.00
Gim Cheow	95,674.50	25,832.00	4,833.00	30,665.00
Gim Seong	237,349.00	64,084.00	11,990.00	76,074.00
Gim Guan	211,349.00	57,064.00	10,677.00	67,741.00
	<u>\$641,047.00</u>	<u>173,082.00</u>	<u>32,383.00</u>	<u>205,465.00</u>

I In 1947 the testator created the "Gim Kee" account by transferring his savings amounting to \$101,829.47 in Hock Hin Bros. Ltd. into this special account which was apparently for the benefit of his four sons by his first wife bearing the middle name of "Gim". Various sums had been withdrawn from this account and distributed equally among the four.

Consequently, this account had only a balance of \$34,646.50 in 1948. By 1949 there was nothing left in this account. In view of the delay in payment the estate duty together with interest came to \$123,300.65 by October 27, 1966 when it was paid.

The First Suit

Between 1963 and 1965 defendants distributed various sums to all beneficiaries except plaintiff of the residuary estate totalling \$33,000 for each 1/13th share. Therefore, plaintiff claimed to be entitled to \$66,000 for his 2/13th share plus interest. This is the basis of his claim in the first civil suit No. 98 of 1966. The defence is a set-off comprising estate duty on gifts (\$57,064.23), estate duty interest (\$10,676.24) and 5% interest on estate duty (\$41,065.15) making a total of \$108,805.62. Deducting \$66,000 from the total leaves a balance of \$42,805.62 as a counterclaim.

Estate duty on the *inter vivos* gifts was paid out of the estate. In his reply to the set-off and counterclaim plaintiff alleged that estate duty on his *inter vivos* gifts was paid without his knowledge, consent or request and that it was paid under a mistake of law and, therefore, not recoverable. He further contended on the alternative that defendant's right to recover the estate duty was barred by limitation. The question of limitation will be dealt with later.

Leaving out the proviso, section 26(i) of the Estate Duty Enactment (F.M.S. No. 7 of 1941) provides that:—

"The executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death and may pay in like manner the estate duty in respect of any other property passing on such death which is under the control of the executor, or in the case of property not under his control if the person who is the accountable person for the estate duty in respect thereof request him to make such payment."

The liability of the executor is to pay duty out of the estate in respect of all property of which the testator was competent to dispose at his death and of any other property passing on such death which is in the executor's control. In the case of property not under the executor's control, e.g. gifts *inter vivos*, then the donee would be accountable to estate duty. An executor may, however, make such payment if the donee requests him to do so.

Section 33(ii) states that:—

"Where the executor is not accountable for estate duty in respect of any property passing on the death of the deceased, the accountable person shall verify the estate duty account of all the property which passes to such person."

Consequently, plaintiff contended that defendant acted in breach of section 26(i) by paying duty on his *inter vivos* gifts. As the donee is directly accountable to the Collector of Estate Duty he must personally pay duty on such gifts. In support plaintiff relies on *In re Foster*,⁽⁹⁾ *In re Beddington*,⁽¹⁰⁾ *In re Crocker*,⁽¹¹⁾ and *In re Hudson*.⁽¹²⁾

If there had been a request to the executor to pay estate duty then the donee would be liable *ex contractu* or for money had and received. It was submitted that the executors could not impose a liabil-

ity on plaintiff by conferring an unsought benefit in the light of *Sinclair v. Brougham*⁽¹³⁾ and *Cleador's Trust Ltd.*⁽¹⁴⁾ An exception arises in the case of mistake of fact but not one of law. In this case the mistake is one of law so defendant could not recover the money from plaintiff. Chitty on Contracts, 20th Edition, page 104 was cited in support. Where an executor made payment voluntarily under a mistake of law or as to the legal effect under which it was made, he could have no right of appropriation from or of impounding or retaining the residual legacy payable to a beneficiary. In deciding what is inequitable the test is to ask who is primarily responsible. Plaintiff says the mistake was made by the trustee so he could claim no repayment. Plaintiff relies on such authorities as *Hill v. Kirshenstein*,⁽¹⁾ *In re Hatch*,⁽²⁾ *Warren v. Warren*,⁽¹⁵⁾ and *Ministry of Health v. Simpson*.⁽³⁾ Although under the Indian Contract Act which is the law applicable to the former Federated Malay States money paid under a mistake of law is recoverable, it is not so in Penang where the English law of contract applies.

In *Sinclair v. Brougham*⁽¹³⁾ the House of Lords held that the power of a building society to borrow money must be limited to borrowing for the proper object of the society, and that the carrying of banking business by the society was *ultra vires*. In his judgment, Lord Sumner said at page 452:—

"There was no mistake of fact. The facts were fully known so far as was material. The rules and objects of the society were accessible to all. The only mistake made was a mistake as to the law or that mistake of conduct to which all of us are prone, of doing as others do and chancing the law."

In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*⁽¹⁶⁾ Lord Wright, dealing with an appeal concerning a claim for the repayment of money made on account of the price under a contract which had been frustrated, made these pertinent observations:—

"... Thus in *Sinclair v. Brougham* ([1914] A.C. 398, 452) Lord Sumner stated that 'all these causes of action [sc. for money had and received] are common species of the genus *assumpsit*. All now rest, and long have rested, upon a notional or imputed promise to repay. This observation, which was not necessary for the decision of the case, obviously does not mean that there is an actual promise of the party. The phrase 'notional or implied promise' is only a way of describing a debt or obligation arising by construction of law. The claim for money had and received always rested on a debt or obligation which the law implied or more accurately imposed, whether the procedure actually in vogue at any time was debt or account or case or *indebitatus assumpsit*. Even the fictitious *assumpsit* disappeared after the Act of 1852. I prefer Lord Sumner's explanation of the cause of action in *Jones's case* ([1926] A.C. 670, 696.) This agrees with the words of Lord Atkin which I have just quoted, yet serious legal writers have seemed to say that these words of the great judge in *Sinclair v. Brougham* closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a *reductio ad absurdum* of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument, to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair v. Brougham*."

Those cases cited have been dealt with thoroughly by the learned judge. With respect, he has made a clear analysis and reached certain conclusions. *Rogers v. Ingham*⁽⁵⁾ was distinguished in *Simpson's case*.⁽³⁾ The learned judge had to decide whether it was equitable or not to ask a donee to pay for the benefit he

had enjoyed in the use of the money. At page 152 of the Appeal Record the learned judge, after reviewing the authorities, expressed his views:—

"...that where it is inequitable for the party who received the money or the benefit of any payment to retain it, he should be made to repay or account for the benefit."

He went on to say that:—

"The various charities who received the donations in *Ministry of Health v. Simpson & Ors.*⁽³⁾ in good faith were nevertheless ordered to refund to the beneficiaries. For myself, I do not, with respect, see any difference between these charities and the plaintiff in this case and between the next of kin and the defendant in his personal capacity. This is, in my view, eminently so, in the finding I have made which appears to me to be supportable on the evidence that the plaintiff knew and acquiesced in the payment of the estate duty on the gifts received by him."

Mr. Lim for plaintiff says that there is no evidence of acquiescence or that plaintiff knew about the *inter-vivos* gifts. Acquiescence may be inferred from conduct or surrounding circumstances. With respect, we think the learned judge is right in his finding of fact. The duty was paid by 1951 while plaintiff was still working in Hock Hin Bros. Ltd. and had access to the account books. He did not impress the learned judge as a witness of truth. In fact, he had not been honest with his accountants, Buckle Sykes & Weatherly regarding the *inter-vivos* gifts.

In their report at page 350 there is this passage:—

"We have no information as to the identity of the donees but if the donees were members of the deceased's family it would be worth considering whether the gifts were intended as advances to his family in which case if the gifts were made within the statutory period they were made subject to a contingency that if the deceased died within the next 3 years the subject matter of the gifts would be liable to be charged for estate duty and consequently the value of the gifts returned by the donees for estate duty purposes should be the amount of the gifts less the estate duty payable in exactly the same way as if the gifts when made had been subject to a mortgage or charge and estate duty would then be payable only on 'the value of the gifts under deduction of the amount of duty' (re *Beddington* [1900] 1 Ch. 771)."

At page 18 of the Appeal Record plaintiff stated that he only knew about the shares given to him in 1950. This is not true. A perusal of the Appeal Record (Vol. II pages 531 to 537) indicates that in 1948 plaintiff purchased the shares which form the *inter vivos* gifts. It is not in dispute that the purchase was a sham for the purpose of evading payment of estate duty. The Collector of Estate Duty found out about these shares and assessed duty on them. When estate duty was paid on his behalf he refused to pay despite the fact that he had the use of the money from 1948 onwards free of interest.

Mr. Lim says the distinction between *Simpson's case*⁽³⁾ and the present case is important. The other residuary legatees of the estate could proceed against plaintiff if the trustees had failed to make restitution. It would then be a claim in equity as in *Simpson's case*.⁽³⁾ But, the plaintiff's claim is against the defendants, the executors and trustees, for \$66,000 which they failed to distribute or which they impounded. To succeed in the set-off and counterclaim they have to prove that plaintiff knew about the payment of estate duty and that he acquiesced in such payment. Earlier on plaintiff was shown to have been a party in evading estate duty. So, he could not deny that

A he knew estate duty was payable. He concealed information even from his accountants whom he asked to audit the account. When the accountants questioned about identities of the donees and the refund by the donees he should have disclosed all he knew. He did not do so simply because as a donee he would have to refund the money also. Further, when payment was made to the Collector of Estate Duty he was working in the firm. He had the opportunity to look at the account books. Also, defendant kept him informed from time to time about the administration of the estate.

B In discussing about payment under mistake of law in *Rogers v. Ingham*⁽⁵⁾ Mellish L.J. stated at page C 357:—

"I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt as was said by Lord Justice Turner, 'This Court has power (as I feel no doubt it has) to relieve against mistakes of law' as well as against mistakes in fact, that is to say, if there is any equitable ground which makes it, under the particular facts of the case inequitable that the party who received the money should retain it."

D In *Kiriri Cotton Co. Ltd. v. Dewani*⁽⁶⁾ Lord Denning having referred to what James L.J. said in *Rogers v. Ingham*⁽⁵⁾ remarked that:—

"...if there is something more in addition to a mistake of law — if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake — then it may be recovered back."

E The Law of Restitution by Goff & Jones states at page 86 that:—

"After some early hesitation, it is now well established that the courts will allow a trustee or a personal representative to deduct sums overpaid under a mistake of law from future instalments due to the overpaid beneficiary. In *Dibbs v. Goren* (50 E.R. 904) Lord Langdale M.R. permitted a trustee to deduct such sums from other funds due to a legatee, and in *Re Musgrave* ([1916] 2 Ch. 417) — a trustee who had failed through a mistake of law to deduct income tax from payments of annuities, was allowed to deduct the amount of the tax from future payments. The court will always correct, in the administration of a trust, errors of account between trustees and *cestuis que trust*."

G Russell J. expressed his view in *re Wooldridge*⁽¹⁷⁾ thus:—

"...the position here is quite different from *In re Hatch* ([1919] 1 Ch. 351), which was solely a case of debtor and creditor. Here the property had already been brought under tax. The Crown was not affected. It was a question only between beneficiaries. In such a case the court would always adjust. In his judgment *In re Musgrave* ([1916] 2 Ch. 417) governed this case."

H Turning to *Dibbs v. Goren*⁽¹⁸⁾ we would refer particularly to what Lord Langdale M.R. said:—

"Where a trustee takes on himself to act upon his authority, and pays to the parties beneficially interested sums to which they are not entitled, it becomes necessary for the court to enforce the execution of the trust, by recovering back the sum thus received contrary to the trusts. The difficulty has arisen from the trustees acting without the assistance of the court, and running the risk of error. Unfortunately they have made these payments, and by their act, some of the parties have received a portion of the estate, to which they are not entitled. I cannot allow them to retain it."

I In this case the defendants are not only executors and trustees but are also beneficiaries. No doubt they have made a mistake. It is a mistake of law. Nevertheless, honest trustees acting *bona fide* are better

treated these days than in former days. This is particularly so where there is no suggestion of misconduct. In administering justice there is nothing to prevent the court from granting relief to one party as against the other. Thus, in *In re Ainsworth*⁽¹⁹⁾ where the executors wrongly paid the legacy duty payable in respect of the life interest in a settled legacy it was held that the error must be rectified and that what had been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income. At page 104, Joyce J., rejecting the contention that the executors could have no relief, remarked that:—

"The only authority relied upon in support of this contention was the decision of Warrington J. as reported in the case of *In re Horne* ([1905] 1 Ch. 76), and which is said to have established for the first time some general rule that prevents the error being set right in such circumstances as those of the present case. I am unable to accept this argument. Moreover, in these days innocent trustees acting *bona fide* are not treated with the severity of former days; and the case of *In re Horne* was a totally different one from the present. There I should most probably have arrived at the same conclusion as Warrington J. did; but his judgment, I think, goes beyond anything required for the purposes of the decision."

Mr. Lim says that this is a court of law not of conscience or morals and that equity does not come in. On the other hand, Mr. Chin argues that the defence of acquiescence was evoked by equity and the learned judge rightly held that on the facts plaintiff acquiesced in the payment of estate duty. Where there is a conflict of equity and common law the rules of equity shall prevail. (See section 3(2) of the Civil Law Act, 1956).

Several grounds of appeal question the findings of facts by the learned judge. An appellate court should be slow to interfere with such findings, particularly when very much depends upon the view a learned judge takes of the credibility of the witnesses. An appellate court does not have the advantage which a learned trial judge has of seeing and hearing witnesses. In this case the learned judge was clearly not impressed by plaintiff for he stated at page 147 of the Appeal Record:—

"In the circumstances of the case I much prefer the evidence of the defendant to that of the plaintiff and I find as a fact that the plaintiff had knowledge of how the estate was administered and in particular about the payment of estate duty on the gifts *inter vivos* from the estate and that if he had not requested the defendant to pay the estate duty on the gifts to him he knew of and acquiesced in such payment."

With respect, we can see no reason to quarrel with the finding of the learned judge that the relationship between the defendant and plaintiff became strained towards the end of 1952. It was not in dispute that plaintiff worked in Hock Hin Bros. Ltd. until 1953. He signed the transfer of shares in 1948 clearly involving himself in the evasion of estate duty. Obviously, he knew that estate duty was payable on these shares. Payment of duty on shares was fully paid by 1951 when he had access to the account books. If plaintiff had worked until 1953 the assumption would be that prior to that year the relationship between the two brothers must be so bad that plaintiff decided to leave the firm.

A In the light of the evidence in this case, we agree entirely with the statement of the learned judge at page 152 that:—

"Even if it is correct that the payment of estate duty in respect of gifts *inter vivos* given to someone who is also a residuary beneficiary and who therefore has properties which could be attached in payment of any lawful claim against him is a mistake of law, I am of the opinion that the circumstances of this case render it inequitable that the plaintiff should be allowed to retain the benefit of the payment on the gifts *inter vivos*."

The Second Suit

In the second civil suit No. 57 of 1968 plaintiff alleges that there is a sum of \$101,827.47 in the account of Hock Hin Bros. Ltd. under the name of "Gim Kee". Plaintiff avers that defendants not only have failed to include that sum in the assets of the estate but also to distribute the sum in accordance with the terms of the will on April 13, 1960. He maintains that estate duty payable is \$45,692.77 leaving a balance of \$56,136.77 for distribution. He claims to be entitled to \$8,636.40 for 2/13th share. The "Gim Kee" account was created for the benefit of the testator's sons with the middle name "Gim" — in other words the sons by the first wife. The Collector of Estate Duty considered the gifts to be made within three years of the testator's death and, therefore, attracted duty. Because of the delay in paying duty, 3rd defendant personally shouldered the burden of \$116,683.33 payable by December 31, 1964 which sum was augmented to \$123,350.65 (with interest added) and paid in full by October 27, 1966.

The "Gim Kee" account was created in 1947 with the sum of \$101,829.47. At the end of 1948 the fund stood at \$34,999.25. By 1949 there was nothing left in the account. Between 1948 and 1949 plaintiff drew three sums from this fund totalling \$23,000. Defendant says if plaintiff were entitled to \$8,636.40 he would, therefore, be overpaid by \$14,363.60. This forms the basis of the counterclaim. As an alternative defendant says that plaintiff's 1/4th share of estate duty is \$30,837.66. His 1/4th share in the "Gim Kee" account is \$25,457.37. Therefore, plaintiff has still to pay (\$30,837.66 less \$25,457.37) \$5,380.29. As he has already received \$23,000 the total amount due from him is (\$23,000 and plus \$5,380.29) \$28,380.29.

It is said that the case of *Official Assignee v. Tan Cheng Guan*⁽²⁰⁾ shows that the Chinese character "Kee" (記) does not mean account but partner. We do not think it shows anything of the kind. There Justice Hyndman-Jones made an order dated July 24, 1902 declaring Tan Cheng Guan to be a partner in the bankrupt firm of Chong Chiap Guan and adjudicating him a bankrupt. The Court of Appeal of the Straits Settlements allowed the appeal by reversing the order. The Privy Council dismissed the appeal. The headnotes made the matters clear. A promise made after the bankruptcy of a firm by a person to pay one of the firm's creditors is no evidence that the promisor was a partner of the firm. Further, the Chinese character "Kee" (記) appended to names of persons in account books of a firm does not always mean partner and little weight can be attached to it as evidence of a partnership in the firm. We have looked

up the World Chinese-English Dictionary Revised Edition. The word "Kee" (記) pronounced "Chi" in Mandarin, may be used as a noun or verb. It has the following meanings: — "(noun) record; register; account. (verb) (1) to remember; keep in mind; (2) to register; record; write down." There is nothing said about partner or partnership.

Mr. Lim says the learned judge misunderstood him as it was not his contention that the sums were gifts *inter vivos*. There was no outright gift as the testator still enjoyed the interest. There had been no valid declaration of trust *Richard v. Delbridge*⁽²¹⁾ and *Warriner v. Roger*.⁽²²⁾ The intended gift was incomplete: *In re Fry*.⁽²³⁾ If it was not a gift there must be a declaration of trust: *In re Rose*.⁽²⁴⁾ It is quite clear that property which did not pass under the provisions of section 5 of the Estate Duty Enactment would go to the estate.

Further, Mr. Lim submits that there was no continuing intention, therefore, the rule in *Strong v. Bird*⁽⁸⁾ would not apply. *In re Stewart*⁽²⁵⁾ the rule of *Strong v. Bird*⁽⁸⁾ was extended. Continuing intention was shown in the case of *In re James*⁽²⁶⁾ where furniture and title deeds of certain houses were handed over. It was held in *In re Innes*⁽²⁷⁾ that the rule in *Strong v. Bird*⁽⁸⁾ and extended by the case of *In re Stewart*⁽²⁵⁾ ought not to be further extended to a mere promise to pay an indefinite sum at a future time. It was submitted that the learned judge was wrong to apply the rule in *Strong v. Bird*.⁽⁸⁾ Even if he was right in applying the rule in *Strong v. Bird*⁽⁸⁾ the consequential order made was wrong.

Mr. Chin says those cases cited are really not relevant as they related to facts peculiar to those cases. The facts of the particular case must be looked into. Most witnesses gave evidence about events which happened more than 25 years ago. It is not possible to expect them to remember every detail. However, in the case of documents such as letters these speak for themselves.

In 1947 plaintiff went abroad to further his study. He gave 3rd defendant a Power of Attorney (Pg. 439 of Appeal Record Vol. II) to look after his interest in his absence. He returned a few days before his father's death. Shortly after his father's death he went back to Canton to continue his studies at Lingnan University. He wrote to 3rd defendant regularly. In fact, he was closer to 3rd defendant than to his father. In 1949 he finally returned home. The following year he worked in Hock Hin Bros. Ltd. until 1953. On July 11, 1950 plaintiff revoked the Power of Attorney given to 3rd defendant (Pg. 499 of Appeal Record, Vol. II). The trouble with plaintiff is that he has no real income but has to rely on the capital given by his father. 3rd defendant has cautioned him to use his money wisely. Plaintiff seems to be in need of money all the time he was abroad. This has to come from somewhere. There is no doubt that he wrongfully but perhaps honestly believed that his mother had left him jewellery which 3rd defendant kept and later sold and converted to his own use.

A He was only 9 years old when his mother died. On this point the learned judge remarked aptly at page 146 of the Appeal Record: —

"The fact however was clear on the evidence that the mother died intestate and that at law, on intestacy, all her estate devolved on her husband and there was equally no doubt of the evidence that the father had in fact kept the jewellery and sold some of them. What he did with the proceeds of the sale or with the jewellery that was not sold was of course his right as the person to whom the property devolved at death."

B

The learned judge continued and, with respect, made these pertinent observations: —

C "In my view, there was no justification for the plaintiff's suspicion that the third defendant had cheated him of the jewellery which he was in any event unable to identify but the fact remains that from the moment he had that suspicion, his love for his brother turned to intense hatred and the passage of time had not, in any way, diminished that hatred. It was apparent in his bearing and the way in which he gave evidence it hid the charm which he obviously had and which occasionally the court had a glimpse of. One must wonder whether this intense feeling had not only coloured his outlook but had also distorted his view of things."

D

In our view Mr. Chin was perfectly right to say that plaintiff had totally departed from the stand previously adopted at the hearing when the learned judge had been urged to accept the proposition of the law laid down in *Strong v. Bird*.⁽⁸⁾ Bearing in mind that the will was made in 1945 and that there were other children by his other wives it was not surprising that the deceased, being a Chinese perhaps under the influence of custom, considered his sons by the first wife should get something more by creating the special "Gim Kee" account.

E

F On the evidence the learned judge is clearly right in his conclusion at page 153: —

"As for the later case in respect of the 'Gim Kee' account, the gifts to the plaintiff, as his own counsel contended, was clearly an imperfect gift but in respect of the gift to the three defendants, it was perfected by the rule in *Strong v. Bird* (1874) L.R. 18 Eq. 315 by the donor naming them his trustees and executors. The gift to the plaintiff falls into residue and the plaintiff is entitled as a residuary legatee to a 2/13th share in it."

G

On the basis of this finding and accepting duty to be \$45,692.77 the learned judge found the balance to be \$56,136.70. Therefore, he said the quarter that falls into residue amounted to \$14,034.18. On his 2/13th share plaintiff would be entitled to \$2,150. But, the plaintiff having admitted to receiving sums in excess of his entitlement before the due date of distribution of the residuary estate, has no ground to claim for damages.

H

I Assuming that Mr. Lim is right in his contention that the consequential order made by the learned judge was wrong, it would mean that the quarter that should fall into residue would be \$25,457.37 and not \$14,034.18. Therefore, his 2/13th share would be \$3,685.75 and not \$2,150.10. But, he would be accountable to estate duty. As he maintains that estate duty to be \$45,692.77 a quarter of that is \$11,423.19 and 2/3rds of the quarter is \$1,758.96. Much more estate duty has been paid by 3rd defendant

on the total amount of \$101,829.47. The result would be the same since plaintiff had received a considerable sum from this account far in excess of anything he was entitled.

Limitation

In both suits the reply to the defence and counterclaim in each case alleges that the claim is "time barred by limitation." At the outset we would say this fails *in limine* because the claim is not statute barred. As the distribution of the residuary estate was 12 years after the testator's death no right of action would arise before such period. In the *Minister of Health v. Simpson*⁽³⁾ it was held that an action in respect of a claim to personal estate was within section 20 of the Limitation Act, 1939 and, therefore, the limitation period was 12 years and the claim was not barred. Section 23 of our Limitation Ordinance is *in pari materia* with section 20 of the English Limitation Act. By virtue of the said section 23 the period of limitation in the present case is also 12 years. The learned judge, considering himself bound by *Nasri v. Mesah*⁽⁷⁾ stated that time did not run against defendant until plaintiff had resisted his claim. It seems to make no difference whether the period is 6 or 12 years as the plea of acquiescence cannot be defeated having regard to the provisions of section 32 of the said Ordinance. Section 4 of the said Ordinance reads as follows:—

"Nothing in the Ordinance shall operate as a bar to an action unless this Ordinance has been expressly pleaded as a defence thereto in any case where under any written law relating to civil proceedings for the time being in force such a defence is required to be so pleaded."

It is submitted that for limitation to operate as a bar to an action the Ordinance must be expressly pleaded. Here the defence of limitation has been set up though the Ordinance is not mentioned. Limitation is a matter of procedure. Order 19 rule 15 reads:—

"15. The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings as, for instance, fraud, limitation, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

In *In re Robinson's Settlement, Gant v. Hobbs*⁽²⁸⁾ Buckley L.J. dealing with Order 19 rule 15 made these observations:—

"Order XXIX., r.15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined, as Mr. Cave contended, to a case where a statute is the thing to be pleaded; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the court shall adjudicate upon the matter as if a ground valid in law did not exist."

He went on to say that:—

"The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the court to prove. If he does not do that the court will deal with it in one of two

A ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just."

B In the light of Order 19 rule 15 we think we should not insist that defendant should mention the Ordinance by *name* but it would be sufficient for him to say that the claim is time barred by limitation or statute-barred so long as plaintiff is not taken completely by surprise.

Conclusion

C In both suits the right to set-off and counterclaim is based on estate duty having been paid out of the estate on the *inter vivos* gifts and by 3rd defendant personally in respect of money in the account known as "Gim Kee" account. Most of the authorities cited in the first suit are also applicable to the second suit so that there is no necessity to repeat them *ad nauseam*.

D The learned judge considered defendant's reliance on section 60 of the Trustees Ordinance to be a strong one but felt no necessity to deal with it. Defendant now applies to this Court to grant him such relief.

E We note from the order at pages 156 to 158 of the Appeal Record the counterclaim is given as \$43,805.62. We believe this should be \$42,805.62. In his submission Mr. Chin conceded that the claim for \$30,837.66 was not allowed by the learned judge who allowed the counterclaim in the sum of the advances to plaintiff \$2,159.10 and costs. This would come to (\$23,000 less \$2,159.10) \$20,840.90. Plaintiff would have to pay more on the basis that the consequential order made by the learned judge was wrong. F With respect, we would not disturb the learned judge on this counterclaim.

G In view of the number of proceedings relating to the estate and in order to make clear that defendant should not be liable to make good to plaintiff any benefit already received or enjoyed by plaintiff there would also be an order granting defendant the relief sought. Apart from this, we would uphold the decision of the learned judge and dismiss the appeal with costs here and below. Deposit to defendant against taxed costs.

Appeal dismissed.

H Solicitors: *Lim Ewe Hock; Allen & Gledhill.*

I